Montecito Heights Healthcare & Wellness CENTRE, LP *and* Service Employees International Union, United Long Term Care Workers. Case 31–CA–129747

January 9, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 30, 2016, Administrative Law Judge Raymond P. Green issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed a reply brief. In addition, the Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. Pursuant to the grant of the Charging Party's subsequent request for additional briefing, both the Charging Party and the Respondent filed supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an Alternative Dispute Policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the Alternative Dispute Policy is unlawful based on *Murphy Oil* must be dismissed.[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 9, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joanna Silverman, Esq., for the General Counsel.

Kamran Mirrafati, and *Richard M. Albert, Esqs.,* for the Respondent.

David A. Rosenfeld, and *Lisl R. Soto, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. On May 30, 2014, the Service Employees International Union, United Long Term Care Workers filed a charge in Case 31–CA–129747. In substance, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it implemented a policy that sought to require its current and former employees

[1] The Charging Party's brief in support of exceptions and its supplemental brief filed after the Supreme Court's decision in *Epic* raise numerous arguments that are wholly outside the scope of the General Counsel's complaint. At no point in this litigation has the General Counsel argued that a violation must be found on any basis other than the rationale underlying the holding in *Murphy Oil*. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See, e.g., *SJK, Inc. d/b/a Fremont Ford*, 364 NLRB No. 29, slip op. at 2 fn.1 (2016) (rejecting similar arguments made by charging party in addition to *Murphy Oil* theory of violation), and *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 fn.2 (2016) (same); see also *Kimtruss Corp.,* 305 NLRB 710 (1991). We therefore find no need to address individually the other issues raised by the Charging Party.

to agree to enter into an alternative dispute resolution policy that required employees to waive their right to pursue a civil court action in court or any other forum.

On May 12, 2016, the parties filed a joint motion to transfer proceedings to the Division of Judges and a joint stipulation of facts.

Upon consideration of the stipulated record and the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited partnership with an office and place of business in Los Angeles, California, where it has been engaged in the operation of a skilled nursing facility providing personal care and other services. It annually derives gross revenues in excess of $100,000. At its facility in Los Angeles, Respondent purchases and receives materials and services valued in excess of $5000 from outside the State of California. It is stipulated and I find that the Respondent has been and is an employer engaged in commerce. It also was stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about December 6, 2013, the Respondent maintained an alternative dispute resolution policy and an agreement to be bound by alternative dispute resolution policy (ADR policy). The ADR policy included an arbitration provision which, if signed by employees, requires them to waive the right to bring or participate in class or collective action in all forums, whether arbitral or judicial.

The ADR policy states that:

> The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES, ON THE ONE HAND, AND MONTECITO HEIGHTS HEALTHCARE & WELLNESS CENTRE AND/OR ITS RESPECTIVE EMPLOYEES AND OFFICERS (HEREINAFTER COLLECTIVELY THE "COMPANY"), ON THE OTHER HAND. Any disputes which arise and which are covered by the ADR Policy must be submitted to final and binding resolution through the procedures of the Company's ADR Policy.
>
> For parties covered by this Alternative Dispute Resolution Policy, alternative dispute resolution, including final and binding arbitration, is the exclusive means for resolving covered disputes (as defined below); no other action may be brought In court or in any other forum. This agreement is a waiver of all rights to a civil court action for a covered dispute; only an arbitrator, not a Judge or Jury, will decide the dispute.

The ADR policy expressly prohibits employees from joining a class action or representative action.

The ADR Policy is set forth in a 3-page document, at the bottom of which at the 20th paragraph, it states:

> Nothing in the Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state age cy seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All employees employed by the Employer at its facility located at 4585 North Figueroa, Los Angeles, California, including the following classifications: C.N.A.; R.N.A.; Cook; and All Other Positions: Dietary, Housekeeping, Laundry, N.A.
>
> Excluded: Office clerical employees, professional employees, guards, watchmen and supervisors as defined in the National Labor Relations Act, as amended.

ANALYSIS

This is yet another case involving an employer's implementation of a policy seeking to have employees enter into agreements that waive their right to utilize any legal process to enforce collective interests in relation to wages, hours, and terms and conditions of employment.

The Board's position, despite reversals by several circuit courts, is that an employer violates Section 8(a)(1) when it establishes policies that effectively force its employees to only utilize arbitration to resolve employment disputes and to have them waive the right to act in concert by seeking to preclude class actions whether in court or before an arbitrator.

As an Administrative Law Judge of the NLRB, I am bound to follow Board precedent irrespective of contrary opinions by circuit courts, unless and until the Supreme Court makes a definitive ruling on the subject matter in dispute.

In my opinion, this case is controlled by the Board's decision in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied, 808 F.3d 1013 (5th Cir., Oct. 26, 2015). In that and subsequent cases, the Board has held that requiring employees to sign class action waivers, with or without an "opt out" clause, is a violation of Section 8(a)(1) of the Act.

The Respondent asserts that its ADR policy does not infringe on Section 7 rights because the policy was optional and not required as a condition of employment. Strictly speaking, the policy does not require employees to execute the proferred "Agreement to be bound by Alternative Dispute Resolution Policy." But one has to wonder how many employees, being asked to sign the document, typically at the start of their employment, would have sufficient knowledge to even consider refusing to sign it.

Even so, the Board's position is that an employer will violate the Act whether or not an ADR policy is mandatory or voluntary. Thus in *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), the Board held that the arbitration policy violated the Act even if employees could opt out of the agreement. The Board stated:

> [W]e find that even assuming, as the Respondent argues, that the opt-out provision renders the arbitration agreement not a condition of employment, it is still unlawful because it requires employees to prospectively waive their Section 7 right

> to engage in concerted activity. Our conclusion follows directly from Supreme Court decisions holding that individual agreements between employees and employers cannot restrict employees' Section 7 rights, from settled Board precedent to the same effect, and from the Norris-LaGuardia Act, which provides that "*any* … undertaking or promise in conflict with the public policy declared in" that statute is unenforceable. For the reasons already articulated in *D. R. Horton* and *Murphy Oil*, the Federal Arbitration Act does not pose an obstacle to our broader holding today. There is no conflict between the NLRA and the FAA, and even if there were, the Norris-LaGuardia Act demonstrates that the FAA "would have to yield insofar as necessary to accommodate Section 7 rights."

It is also the case that the Respondent's ADR policy specifically excludes charges that might be filed with the National Labor Relations Board. But as noted above, this provision is located at the bottom of a 3-page document and contains no explanation of the types of charges that might be subject to NLRA jurisdiction. As such, it is my opinion that no reasonable employee could possibly understand what this provision means and it therefore cannot serve as a defense. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at page 6 (2015), where the Board stated:

> It would be unclear to the reader (especially to a reader without specialized legal knowledge) whether and to what extent the subsequent language creating an exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity… This ambiguity would lead a reasonable employee to wonder whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason to affirm the judge's finding that the Agreements unlawfully prohibit filing charges with the Board.

The Union makes an additional argument to the effect that the employer's policy should be illegal under Section 8(a)(1) because it also conflicts with the Religious Freedom Restoration Act. To my mind, this is a unique if unpersuasive argument. The National Labor Relations Board has not been given the authority to enforce any law other than the National Labor Relations Act. Whatever merit this argument may have, I don't think it needs to be addressed by me inasmuch as I have already concluded, based on NLRB precedent, that the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

By maintaining a policy that seeks to require employees to waive their right to bring class actions or to act concertedly in regard to their wages, hours and terms and conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Montecito Heights Healthcare & Wellness Centre, LP, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a policy that seeks to require employees to waive the right to maintain class or collective actions in any forum.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Alternative Dispute Policy in all of its forms, or revise it in all of its forms, to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums or that requires employees to waive their right to maintain employment related class and collective claims in all forums, whether arbitral or judicial.

(b) Notify all current and former employees who signed or otherwise became bound by the Alternative Dispute Policy in any form that it has been rescinded or revised and, if revised, provide them with a copy of the revised policy.

(c) Within 14 days after service by the Region, post at its Los Angeles, California facility location copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and /or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the Alternative Resolution Policy was made available to them. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since December 3, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce the Alternative Dispute Resolution policy or any agreements made with employees pursuant to that policy that waives the right to maintain class or collective action in any forum.

WE WILL NOT seek to require employees to sign binding arbitration agreements that prohibit collective and class litigation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

MONTECITO HEIGHTS HEALTHCARE & WELLNESS CENTRE, LP

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-129747 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.